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12 Attorneys for Defendant

13 ETSY, INC.

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16
17 AS YOU SOW, a 501(c)(3) non-profit
corporation,

18 Plaintiff,

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20 v.

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22 ETSY, INC. and DOES 1-20, inclusive,

23 Defendants.
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Case No.: 24-cv-04203-MMC

**DECLARATION OF NICHOLAS J.
HOFFMAN IN SUPPORT OF
DEFENDANT ETSY, INC.'S
OPPOSITION TO PLAINTIFF'S
MOTION TO REMAND**

Judge: Hon. Maxine M. Chesney

Date: October 11, 2024

Time: 9:00 a.m.

Location: Courtroom 7, 19th Floor

DECLARATION OF NICHOLAS J. HOFFMAN

I, Nicholas J. Hoffman, declare as follows:

1. I am an attorney at law licensed to practice before all the courts in the State of California and am a partner at McGuireWoods LLP, counsel for Defendant Etsy, Inc (“Etsy”). I have personal knowledge of the matters set forth in this declaration, and if called as a witness I could and would competently testify thereto.

2. I submit this declaration in support of Etsy’s Opposition to Plaintiff’s Motion to Remand. Specifically, I provide this declaration to outline Plaintiff’s prior settlement demands in relation to this lawsuit.

3. On March 8, 2024, Plaintiff sent Etsy a formal settlement demand. In that correspondence, Plaintiff demanded over \$290,000 for settlement of its claims, including over \$90,000 in civil penalties, \$142,194.50 in attorneys’ fees for work relating to Plaintiff’s first notice of violation, and \$35,000 in attorneys’ fees for the forthcoming second notice of violation. A true and correct copy of Plaintiff’s March 8, 2024 settlement demand is attached hereto as **Exhibit A**.

4. During a meet and confer conversation on April 25, 2024, when I expressed surprise as to the amount of attorneys’ fees in Plaintiff’s settlement demand, Plaintiff’s counsel Rachel Doughty reiterated and reaffirmed that her law firm had already incurred the attorneys’ fees stated in her settlement demand and that they were continuing to spend significant time to investigate Etsy’s alleged violations.

5. Plaintiff’s counsel has never stated that the amount at issue in this action is less than what is set forth in her settlement demand of March 8, 2024.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on August 20, 2024 at Los Angeles, California.

/s/ Nicholas J. Hoffman
Nicholas J. Hoffman

Exhibit A



RACHEL S. DOUGHTY
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CONFIDENTIAL SETTLEMENT COMMUNICATION

March 8, 2024

By Electronic Mail

Nicholas Hoffman
NHoffman@mcguirewoods.com

Joseph Rezabek
JRezabek@mcguirewoods.com

RE: Settlement Offer Addressing As You Sow's 60-Day Notice of Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) & Demand for Supply Chain Identification

Dear Nick and Joseph,

On January 18, 2024, As You Sow provided Etsy with a 60-Day Notice of Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) & Demand for Supply Chain Identification. Pursuant to California Health & Safety Code section 25249.7, subdivision (d), As You Sow intends to bring an enforcement action against Etsy sixty days after service of this notice. The complaint also would seek relief based upon Etsy's violation of California's Unfair Competition Law, Business & Professions Code section 17200 *et seq.*, predicated on Etsy's violation of the Sherman Food, Drug and Cosmetic Law, Health & Safety Code section 109875 *et seq.*, as well as violation of federal law.

After conferring with As You Sow, we are prepared to settle this matter without litigation pursuant to the terms addressed below in Section II. If no acceptance is received within two weeks of the date of this letter, then the offer is withdrawn.

I. LIABILITY

A. Proposition 65

The voters enacted Proposition 65 in 1986 to permit private enforcement in the absence of government action to protect public health. Proposition 65, among other things, prohibits companies from knowingly and intentionally exposing any individual to a reproductive toxin without first providing a warning. (*See* Cal. Health & Saf. Code, §25249.6.) Violators are subject to an injunction and civil penalties. (*See* Cal. Health & Saf. Code, §25249.7, subd. (a)-(b).)

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“Mercury and mercury compounds” were listed as reproductive toxins under Proposition 65 in 1990. (27 Cal. Code Regs., §27001, subd. (c).)

Mercury is a highly toxic heavy metal. Use of mercury-containing skin creams can cause mercury poisoning, birth defects or other reproductive harms, as well as serious side effects to the skin. The danger is not limited to people who use the products but also to their families.

On December 22, 2023 (nearly a month prior to service of the 60-Day Notice), As You Sow sent a letter to Etsy providing it with public health alerts and tests results that demonstrate these creams contain mercury or mercury compounds and are illegal to sell in the United States. Not only is the mercury content of these creams in excess 1 ppm, but many have been shown to contain levels as high as 20,000 – 30,000 ppm.

Thus, as of December 22, 2023, Etsy had actual knowledge about the mercury content of the Products. Nevertheless, many of the products continued to be listed for sale in January and February of 2024. For example, our investigators have found the following posted on Etsy’s website after December 22, 2023:¹

- Aneeza Gold Beauty Face Cream was available for sale as of January 3, 2024;
- Carotone was available for sale as of February 15, 2024;
- Deluxe Nadinola Bleaching Cream was available for sale as of February 21, 2024;
- Due Beauty Cream was available for sale as of January 9, 2024;
- Faiza was available for sale as of January 3, 2024;
- Goree Day and Night Whitening Cream was available for sale as of January 3, 2024;
- Hnub Yiqi was available for sale as of January 31, 2024;
- La Tia Mana Crema Limpiadora y Curativa was available for sale as of February 16, 2024;
- Magia Blanca de Michelle Marie Crema Blanqueadora was available as of January 17, 2024;
- Miss Key Crema Blanqueadora was available for sale as of January 9, 2024; and
- Nunn Care was available for sale as of January 3, 2024.

As You Sow’s January 18, 2024, 60-Day Notice addresses Etsy’s sale of “skin-lightening, whitening, and ‘smoothing’ creams containing 1 ppm² or more mercury or mercury compounds, including but not limited to” Aneeza Gold Beauty Face Cream, BeBe Special Cream, Carotone, CCM, CCM Perfect 365 White Cream, Crema la Milagrosa, Deluxe Nadinola Bleaching Cream, Due Beauty Cream, Faiza, Face Fresh Beauty Cream, Goree Day Avocado and Aloe vera, Goree Day and Night Whitening Cream, La Tia Mana Crema Limpiadora y Curativa, Miss Key Crema Blanqueadora, and Nunn Care (collectively, “Products”). Etsy bears responsibility for exposures to mercury that result from California sales of these creams and others containing mercury and listed on Etsy’s website.

¹ A spreadsheet with further information, including the specific page URL is provided with this letter (**TABLE 1**).

² The FDA banned the use of mercury in most cosmetics at levels higher than 1 ppm in 1973. (See 21 C.F.R. § 700.13(d)(2), limiting cosmetics generally to 1 ppm and cosmetics “intended for use only in the area of the eye” to 65 ppm.)

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Etsy may attempt to rely on a regulation that limits the liability of retailers, *see* 27 C.C.R section 25600.2, subdivision (e), but its provisions do not apply here. First, there is no retailer exemption if the retailer has actual knowledge of the exposure requiring a warning and the upstream entities are either not subject to a Proposition 65 lawsuit or are not subject to service in California. (*See* 27 Cal. Code Regs., §25600.2, subd. (e)(5).) As You Sow suspects that the upstream entities for these products will generally have fewer than 10 employees, *see* Health & Safety Code section 25249.11 subdivision (b), and will not be subject to service in California.

Etsy may also attempt to argue that, at least for some of the Products, it cured any violation by removing them from Etsy within 5 business days after receiving the 60-Day Notice. However, this ability to cure only applies to retail sellers who first obtain actual knowledge of the need to warn from a 60-day notice. (*See* 27 Cal. Code Regs., § 25600.2, subd. (f).) As Etsy obtained such knowledge no later than December 22, 2023, nearly a month prior to receiving formal notice, the 5 business day provision is inapplicable. And, as shown in the included spreadsheet, we continue to find listings.

B. Unfair Competition Law

As You Sow will also pursue an Unfair Competition claim.

California's Unfair Competition Law (hereafter "UCL"), Business & Professions Code sections 17200 *et seq.*, prohibits businesses from engaging prohibits "unlawful" business practices. An unlawful business practice is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. Virtually any law—federal, state, local or court-made—can serve as a predicate for an action under Section 17200. Etsy has engaged in and continues to engage in unlawful business practices based on its violation of the Sherman Food, Drug and Cosmetic Law (hereafter "Sherman Law"), Health & Safety Code section 109875 *et seq.*, as well as violation of federal law.

The Sherman Law incorporates the labeling requirements set forth in the federal Food Drug and Cosmetic Act (FDCA) and broadly prohibits the sale of adulterated or misbranded cosmetics in California. Mercury-containing creams are "adulterated" because they are a "poisonous or deleterious substance that may render it injurious to health of man or any other animal that may consume it." (Health & Saf. Code, § 110545.) Where such creams do not identify mercury as an ingredient, they are misbranded. (*See id.* at § 111735.) The Sherman Act is a strict liability statute.

II. ADDITIONAL NOTICE

As You Sow will shortly be sending an additional notice, naming creams that were in the December 2023 letter, and which have subsequently appeared on Etsy's site as well as the other parties in the chain of commerce, which were provided to us on February 28, 2024.

III. SETTLEMENT TERMS

As You Sow is prepared to settle this matter for the following material terms, provided that

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settlement can be reached prior to initiation of a lawsuit.

A. Injunctive Relief

1. Etsy will periodically review notices from the FDA, RAPEX, California Department of Public Health, Washington State Department of Health, Minnesota Department of Health, and New York City Department of Health as regards mercury warnings for skin-lightening creams. Etsy will not list on its website, or allow to be listed, any creams containing mercury or mercury compounds in excess of FDA limits. Etsy will agree that it has actual knowledge of any such posting 5 days after posting. Products that are subject of such notices, shall after 5 days be defined in this letter as “Case Products.”
2. Etsy will ensure that no “skin-lightening, whitening, and ‘smoothing’ creams” are posted on Etsy’s website. This prohibition shall include, but not be limited to, those products listed in **TABLE 2**, attached. Products included in **TABLE 2** shall be considered Case Products from the date of settlement.
3. If AYS or any other credible source provides Etsy with information that a skin cream contains mercury or mercury compounds in excess of FDA limits, the parties will agree to update the Case Products list (**TABLE 2**) to include that product.
4. Etsy will provide the contact information and legal name for any party in the chain of commerce that it has associated with the listing and sale of any Case Products within 3 days of learning such information, and, if products are identified in the future, Etsy will provide contact information within 3 days of notice of the posting by AYS.
5. Etsy will send a Proposition 65 warning identifying mercury and mercury compounds to all customers to whom any Case Products have been shipped into California in the last 36 months, and will refund customers the full cost of the product.
6. Etsy will send a Proposition 65 warning identifying mercury and mercury compounds to all customers to whom any Case Products are shipped into California in the future within three days of discovery of that error, and will refund the customer the full cost of the Case Product(s) purchased.

B. Civil Penalties & Alternative Settlement Payments

Any settlement must include the payment of civil penalties. Courts have jurisdiction to impose penalties up to \$2,500.00 per violation of Proposition 65. (*See* Health & Saf. Code, § 25249.7, subd. (a), (b)(1).) To avoid delay and allow for pre-litigation settlement, As You Sow is willing to settle for violations calculated at \$2,000.00 for each of the 45 listings As You Sow has found on Etsy’s website, for a total of \$90,000.00 in civil penalties (allocated $\frac{1}{4}$ to AYS and $\frac{3}{4}$ to OEHHHA).

Additionally, Etsy to pay \$10,000 to AYS for future monitoring and \$10,000 to Mercury Policy Project to provide education to the public regarding the dangers of mercury in cosmetics.

C. Liquidated Damages for Future Listings

For any violation of terms A.2, A.4, A.5, or A.6, above, Etsy will pay liquidated damages in the

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amount of \$5,000.00 per listing, plus \$250.00 per unit sold into California, or failure to timely provide the required warning. To effectuate this term, upon presentation to Etsy of proof of any such listing or sale on Etsy's website, Etsy will, within 5 business days of presentation, provide California sales numbers for that listing for the life of the listing since the date that the parties have signed this settlement. Liquidated damages will be paid within 30 days of receiving such proof of sale.

D. Fees and Costs

Actual fees of \$142,194.50 and costs of \$3,608.12, and in addition \$35,000 for (a) preparing and mailing the supplemental notice for the additional products found on Etsy's website since the last notice was sent, (b) preparing UCL notice to enforcement agencies, (c) preparing, filing, and presenting the complaint and proposed joint consent judgment and supporting motion and declarations.

E. Enforcement

The agreement sunsets in 5 years. The Court will retain jurisdiction throughout that time, and the prevailing party may seek fees under Code of Civil Procedure section 1021.5.

Regards,

A handwritten signature in cursive script, appearing to read "Rachel S. Dwyer".

CERTIFICATE OF SERVICE

I hereby certify that on **August 20, 2024**, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and service via transmittal of a Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **August 20, 2024**, at Los Angeles, California.

/s/ Nicholas J. Hoffman
Nicholas J. Hoffman
McGuireWoods LLP